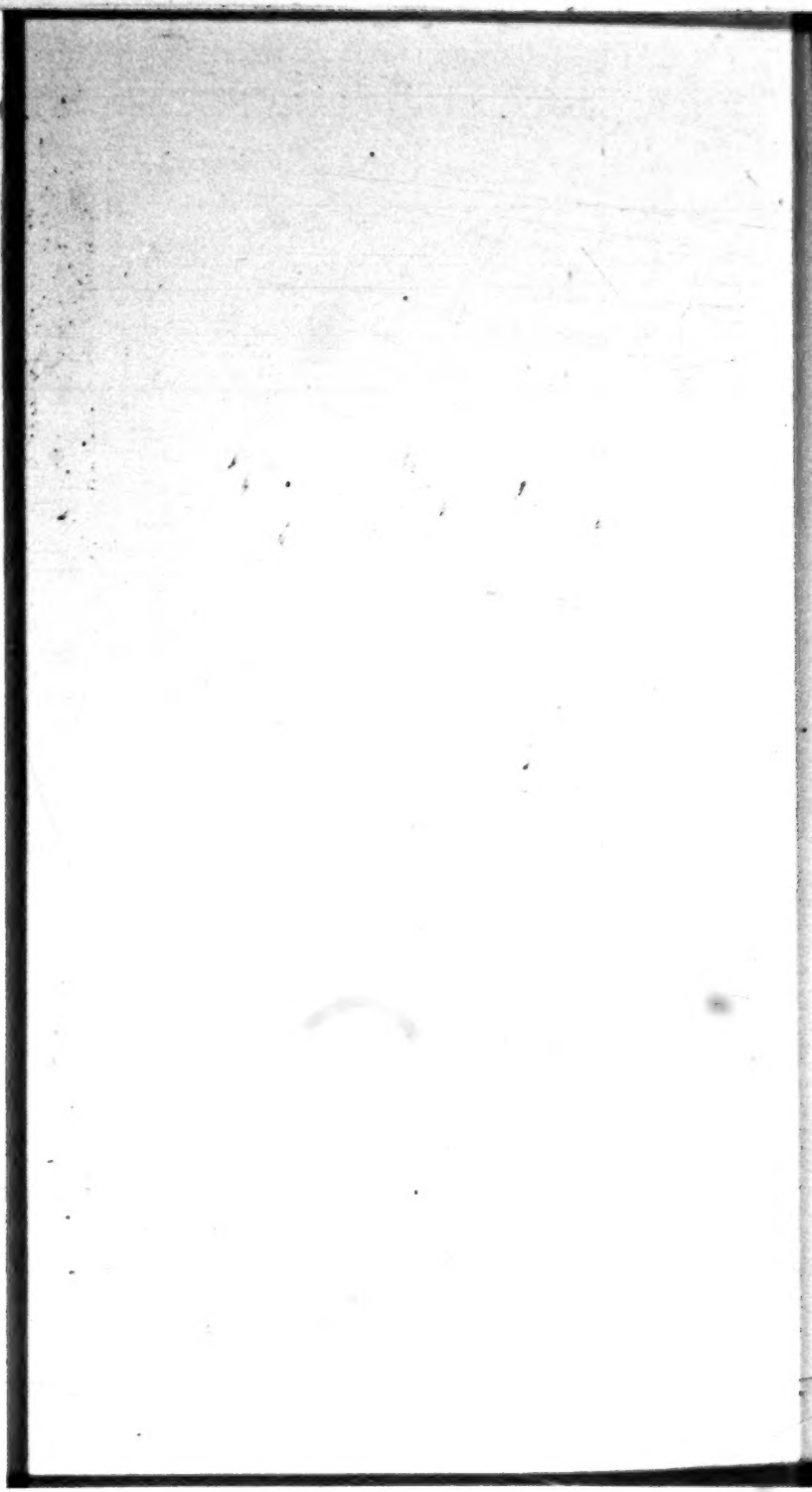

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1129

SUSAN COHEN,

Petitioner,

—v.—

CHESTERFIELD COUNTY SCHOOL BOARD and DR. ROBERT F. KELLY,

Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 72-777

CLEVELAND BOARD OF EDUCATION,

Petitioner,

—v.—

JO CAROL LA FLEUR and ANN ELIZABETH NELSON,

Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION OF AMERICAN CIVIL LIBERTIES UNION; AMERICAN FEDERATION OF TEACHERS, AFL-CIO; AMERICAN JEWISH CONGRESS; AND NATIONAL ORGANIZATION FOR WOMEN, LEGAL DEFENSE AND EDUCATION FUND, FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF OF *AMICI CURIAE*

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Amici respectfully move, pursuant to Rule 42 of this Court's Rules, to file the within brief *amici curiae*. Counsel for the petitioner in *Cohen* v. *Chesterfield County School Board*, #72-1129, 474 F.2d 395 (1973), and counsel for the respondent in *La Fleur* v. *Cleveland Board of Education*, #72-777, 465 F.2d 1184 (1972), have consented to the filing

of this brief; counsel for the respondent in *Cohen* v. *Chesterfield County School Board, supra,* and counsel for the petitioner in *La Fleur* v. *Cleveland Board of Education, supra,* have refused consent.

The American Civil Liberties Union is a nationwide, non-partisan organization of over 200,000 members dedicated to defending the right of all persons to equal treatment under the law. Recognizing that discrimination against women permeates society at every level, and is often reinforced by governmental action, the American Civil Liberties Union has established a Women's Rights Project to work toward the elimination of sex-based discrimination. *Amicus*, American Civil Liberties Union, believes that these cases concerning the rights of pregnant working women pose constitutional issues of great significance to the achievement of full equality under the law between the sexes and to the guaranty of the right to privacy. Lawyers for the American Civil Liberties Union were counsel in *Struck* v. *Secretary of Defense*, #72-178, 460 F.2d 1372 (9th Cir. 1971, 1972), *cert. granted*, 409 U.S. 947 (1972), judgment vacated and remanded for consideration of mootness when the Air Force waived Captain Struck's discharge shortly after her brief was filed. The Brief for Petitioner in *Struck*, filed with this Court on December 8, 1972, discussed in detail the constitutional issues raised by the involuntary discharge of pregnant military officers, in particular, and of pregnant gainfully employed women, in general. With regard to the general problem of discrimination on account of sex that is presented in these cases, lawyers for the American Civil Liberties Union presented the appeal in *Reed* v. *Reed*, 404 U.S. 71 (1971), and acted as *amicus curiae* in *Frontiero* v. *Richardson*, 93 S. Ct. 1764 (1973).

American Federation of Teachers, AFL-CIO (AFT), is a national organization founded in 1916. It is a federation of local teacher unions. At present the affiliated locals number more than 1,000, and the total membership of the AFT is about 400,000. Its membership consists almost exclusively of classroom teachers—many of whom are women and, therefore, vitally interested in this litigation. The AFT is a labor organization affiliated with AFL-CIO, and its purpose is to improve education and to work for the well-being of classroom teachers throughout the United States, as well as some foreign countries.

The American Jewish Congress was formed in part "to help secure and maintain the equality of opportunity . . . to safeguard the civil, political, economic and religious rights of Jews everywhere" and "to help preserve and extend the democratic way of life." It has a special interest in assuring equal recognition of the social, economic and political interests of minority groups and it combats discrimination against such groups whether on grounds of race, religion, national origin or sex.

The National Organization for Women (NOW) is a nonprofit, civil rights organization of over 25,000 women and men members and 550 chapters throughout the United States. NOW was organized in 1966 and is existing for the purpose of securing full and equal social, political and economic rights for women. One of its chief areas of concern and one to which millions of American women look to NOW for leadership is equal employment opportunity. NOW is acutely interested in the outcome of these suits since they will affect the employment rights of every woman of childbearing years, many of its own members being affected and potentially affected.

The purpose of this brief is to argue that automatic termination of a public school teacher's employment on the

sole ground that she is pregnant violates the fourteenth amendment, and that, accordingly, the decision below in *Cohen*, upholding such termination, should be reversed, and the decision below in *La Fleur*, holding such termination unconstitutional, should be affirmed. Because these are the first cases in which the question will be heard by this Court, we believe our brief will be of substantial assistance to the Court in the resolution of the issues raised by these cases.

Respectfully submitted,

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Interest of *Amici*

The interest of *amici* appears from the foregoing motion.

Statement of the Cases

Amici incorporate the Statement of the Cases by the Petitioner in *Cohen* v. *Chesterfield County School Board*, #72-1129, 474 F.2d 395 (1973), and by the Respondent in *La Fleur* v. *Cleveland Board of Education*, #72-777, 465 F.2d 1184 (1972).

SUMMARY OF ARGUMENT

I.

School board regulations requiring termination of the employment of teachers at a fixed stage in the pregnancy cycle reflect arbitrary notions of a woman's place wholly at odds with contemporary legislative and judicial recognition that individual potential must not be restrained, or equal opportunity limited, by law-sanctioned stereotypical prejudgments. Operating on the basis of characteristics assumed to typify pregnant women, and in total disregard of individual capacities and qualifications, the regulations violate the equal protection clause of the fourteenth amendment to the United States Constitution.

The regulations single out pregnancy, a physical condition unique to women involving a normally brief period of disability, as cause for involuntary termination of employment at a uniform date that bears no relationship to the individual teacher's ability to continue working. No other physical condition occasioning a period of temporary disability is similarly treated. Pregnancy apart, a flexible policy applies allowing for consideration of individual cir-

cumstances. As increasingly confirmed by judicial authority, as well as legislative, executive and administrative pronouncements, regulations applicable to pregnancy more onerous than regulations applicable to other temporary conditions discriminate invidiously on the basis of sex.

II.

Heading the list of arbitrary barriers that have plagued women seeking equal opportunity is disadvantaged treatment based on their unique childbearing function. Until very recent years, jurists have regarded any discrimination in the treatment of pregnant women as "benignly in their favor." But in fact refusal to permit capable, healthy pregnant women to continue working drastically curtails women's economic opportunities. In addition to the immediate loss of needed income, fringe benefits may be forfeited, and opportunities for new employment severely reduced.

III.

Regulations mandating termination of a school teacher's employment at a fixed stage of pregnancy, without regard to her preference and her physician's certification of her ability to continue teaching, establish a suspect classification for which no compelling justification exists. Moreover, they impinge upon exercise of the fundamental right to decide whether or not to bear a child and, on that account as well, must be scrutinized closely. Even measured by a less exacting review standard, the regulations must be declared constitutionally impermissible, for they arbitrarily restrict women's access to employment opportunity without promoting any substantial state interest.

Concern for the health of a pregnant woman hardly justifies an iron rule dealing with all pregnancies in an identical, dehumanizing fashion. Continuity of instruction is disserved by ordering a teacher out of her classroom while the term is in full swing. Administrative convenience may not be invoked to excuse a conclusive presumption of unfitness or disqualification. And it is ludicrous to suggest that a pregnant teacher, young and robust as she may be, needs protection against accident and assault more than a man or woman of a certain age with ulcers, high blood pressure or a heart condition.

Because the challenged regulations rely on a sex-based stereotype no less invidious than one racial or religious, establish a conclusive presumption which is factually unjustified, exclude from consideration the fitness of the individual, and treat pregnancy differently from any other physical condition occasioning a period of temporary disability, they deprive pregnant teachers of the equal protection of the laws.

ARGUMENT

I.

Involuntary termination of a woman's employment, solely on the ground that she has reached a fixed stage of pregnancy, constitutes sex discrimination.

"Nobody—and this includes Judges, Solomonic or life tenured—has yet seen a pregnant male."[1] Does disadvantaged treatment of women based on a physical condition no man can experience constitute sex discrimination? Jurists whose perspective reaches beyond the observation that "it can't happen to a man," have answered emphatically "Yes." *E.g., Buckley* v. *Coyle Public School System,* 476 F.2d 92, 95 (10th Cir. 1973); *Green* v. *Waterford Board of Education,* 473 F.2d 629 (2d Cir. 1973); *La Fleur* v. *Cleveland Board of Education,* 465 F.2d 1184 (6th Cir. 1972).

Sex discrimination exists when all or a defined class of women (or men) are subjected to disadvantaged treatment based on stereotypical assumptions that operate to foreclose opportunity based on individual merit. "Discrimination is not to be tolerated under the guise of physical properties possessed by one sex." *Sprogis* v. *United Air Lines, Inc.,* 444 F.2d 1194, 1198 (7th Cir. 1971). Nor is discrimination tolerable when its impact concentrates on a portion of the protected class, for example, married women, mothers, or pregnant women. *Sprogis* v. *United Air Lines, Inc.,*

[1] Adapted from Chief Judge Brown's opinion dissenting from denial of a motion for rehearing *en banc* in *Phillips* v. *Martin Marietta Corp.,* 416 F.2d 1257, 1259 (5th Cir. 1969), *vacated and remanded,* 400 U.S. 542 (1971).

supra; Phillips v. *Martin Marietta Corp.*, 400 U.S. 542 (1971); *Cerra* v. *East Stroudsburg Area School District*, 450 Pa. 207, 299 A.2d 277 (1973).[2]

The Cleveland and Chesterfield County school board regulations terminating the employment of an expectant mother during the fifth month of pregnancy[3] are blatant examples of stereotypical prejudgment that shuts out consideration of individual capacity. The regulations single out pregnancy, a physical condition unique to women involving a normally brief period of disability, as cause for deprivation of the right to work. No other physical condition occasioning a period of temporary disability, whether affecting a man or a woman, is similarly treated. Pregnancy apart, leaves of absence for medical reasons are considered on an individual basis; if the disability is temporary, medical leave with pay is granted to both male and female teachers during convalescence.

A. *Judicial authority.*

Pregnancy regulations similar to the ones at issue here have not withstood dispassionate judicial analysis. The trend of opinion is abundantly clear: regulations applicable to pregnancy more onerous than regulations applicable to

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[2] *Cf. Andrews* v. *The Drew Municipal Separate School*, —— F. Supp. ——, No. GC 73-20-K (N.D. Miss. July 3, 1973) (unwed mother teacher-aides); *Jinks* v. *Mays*, 332 F. Supp. 254 (N.D. Ga. 1971), *aff'd in part and remanded in part*, 464 F.2d 1223 (5th Cir. 1972) (pregnant nontenured schoolteachers); *Ordway* v. *Hargraves*, 323 F. Supp. 1155 (D. Mass. 1971) (pregnant, unwed students).

[3] The school board in *Cohen* candidly used the phrase "termination of employment." The regulation in *La Fleur* characterizes as "maternity leave" provision for dismissal from teaching at the beginning of the fifth month, enforced absence without pay until the first semester following the birth of the baby, and thereafter a rehiring preference, but no guaranteed right to return.

other temporary physical conditions discriminate invidiously on the basis of sex. The following expressions indicate the view now dominant in the lower courts:

> Male teachers are not subject to pregnancy, but they are subject to many types of illnesses and disabilities. This record indicates clearly that pregnant women teachers have been singled out for unconstitutionally unequal restrictions upon their employment. *La Fleur* v. *Cleveland Board of Education*, 465 F.2d at 1188.

> The heart of plaintiff's case is that disqualifying a physically capable woman from working because of a condition related solely to her sex is unconstitutionally discriminatory. Plaintiff admits the obvious, that men do not become pregnant, but points out that men, being human, are also subject to crises of the body, some of which, like childbirth, give ample warning: A cataract operation or a prostatectomy, for example, may be planned months ahead. Because male teachers are not forced by defendant Board to take premature leave because of a known forthcoming medical problem, female teachers should not be treated differently. Thus stated, the argument is persuasive, even compelling. One realizes with a shock what so many women now proclaim: Old accepted rules and customs often discriminate against women in ways that have long been taken for granted or have gone unnoticed. *Green* v. *Waterford Board of Education*, 473 F.2d at 634.

> Male teachers, who might well be temporarily disabled from a multitude of illnesses, have not and will not be so harshly treated. In short . . . pregnant women are singled out and placed in a class to their disadvantage. They are discharged from their employment on the

basis of a physical condition peculiar to their sex. This is sex discrimination pure and simple. *Cerra* v. *East Stroudsburg Area School District*, 450 Pa. at 213, 299 A.2d at 280.

. . . Section 6(F) of Article 95A of the Maryland Annotated Code, which disqualifies all women from unemployment compensation who are five months or more pregnant, is unreasonable, arbitrary, and capricious. Its effect is to cast all females who become pregnant into a class without regard to the individual physical condition, health, ability to or availability for work. As such, it is an invidious discrimination based on sex resulting in a deprivation of rights and a denial of equal protection of the laws under the Fourteenth Amendment. *Orner* v. *Board of Appeals*, Superior Court of Baltimore City, Case No. 132,572, July 28, 1972.

Accord, Jordan v. *Fusari*, —— F. Supp. —— (D. Conn. June 25, 1973) (unemployment compensation); *Aiello* v. *Hansen*, —— F. Supp. —— (N.D. Calif. May 31, 1973) (disability insurance); *Pocklington* v. *Duval County School Board*, 345 F. Supp. 163 (M.D. Fla. 1972); *Williams* v. *San Francisco Unified School District*, 340 F. Supp. 438 (N.D. Calif. 1972); *Heath* v. *Westerville Board of Education*, 345 F. Supp. 501 (S.D. Ohio 1972); *Monell* v. *Dept. of Social Services*, 4 E.P.D. 5936 (S.D.N.Y. 1972); *Doe* v. *Osteopathic Hospital*, 333 F. Supp. 1357 (D. Kan. 1971) (Title VII decision); *see Jinks* v. *Mays*, 332 F. Supp. 254 (N.D. Ga. 1971), *aff'd in part and remanded in part*, 464 F.2d 1223 (5th Cir. 1972); *Robinson* v. *Rand*, 340 F. Supp. 37 (D. Colo. 1972) (concluding that a pregnancy discharge regulation violated due process); *Ordway* v. *Har-*

graves, 323 F. Supp. 1155 (D. Mass. 1971); *cf. Bravo* v. *Board of Education*, 345 F. Supp. 155 (N.D. Ill. 1972).

In sum, an impressive array of decisional authority[4] defines as sex discrimination proscribed by the equal protection clause of the fourteenth amendment state and municipal regulations that classify pregnancy as a singular disability and attach to it consequences more burdensome than those applicable to other physical conditions.

Contrast with what every woman and most men know, the myopic vision of the majority of the court below in *Cohen*. Observing that "only women experience pregnancy and motherhood," the majority concluded that this fact "removes all possibility of competition between the sexes in this area." *Cohen* v. *Chesterfield County School Board*, 474 F.2d 395, 397 (4th Cir. 1973). No competition between men and women to become pregnant? Undeniably so. But that is not the competition at issue here. Whatever natural burdens carrying a fetus till term may entail, it is difficult to understand the logic that impels men to add artificial weight to the load. But that is precisely what the *Cohen* majority approved: a regulation erecting a man-made barrier against women in an area in which they most certainly do compete with men: employment.[5] The *Cohen* decision

[4] The catalogue of decisions cited here is representative, but far from exhaustive.

[5] A Fourth Circuit bench differently composed recognized the vital importance to today's young women of equal opportunity to compete in all areas of employment. *Eslinger* v. *Thomas*, 476 F.2d 225, 232 (4th Cir. 1973): "Adult females . . . are no longer chattels of their husbands or parents. If they are tendered and accept special protection or special courtesies, there is no violation of right; but unwelcome special protection, especially denial of employment opportunity, foisted upon them is counter to modern law and modern social thinking."

that pregnancy disables no man, and is therefore subject to disadvantaged treatment in comparison to other disabilities functionally indistinguishable for employment-related purposes[6] represents the view of a dwindling minority.[7] It reflects astonishing disregard for developing national policy as reflected in legislative, executive and administrative, as well as judicial pronouncements.

B. *Legislative, executive and administrative pronouncements.*

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, establishes as a national priority elimination of employment discrimination on the basis of race, color, religion, *sex*

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[6] As to the assertion that pregnancy is appropriately set apart because it is "voluntary" (*see Cohen* v. *Chesterfield County School Board*, 474 F.2d at 398; Brief for Petitioner in *Cleveland Board of Education* v. *La Fleur* at 24), *compare Buckley* v. *Coyle Public School System*, 476 F.2d at 95: "The fact, if it be a fact, that pregnancy is a voluntary status really has nothing to do with the question. The point is that the regulation penalizes the feminine school teacher for being a woman and, therefore, it must be condemned on that ground."

Given the current state of the art, the more effective contraceptives entail serious health risks for women. Under the circumstances, a certain insensitivity accompanies characterization of pregnancy as a strictly voluntary affair. *See* Segal & Tietze, Contraceptive Technology: Current and Prospective Methods in Reports on Population/Family Planning, Report No. 1 (July 1971 ed.); Tietze, Effectiveness of Contraceptive Methods in Control of Human Fertility: Proceedings of the Fifteenth Nobel Symposium (E. Diczfalusy & U. Borel ed. 1971).

[7] In fact, the federal minority has dwindled to *Schattman* v. *Texas Employment Commission*, 459 F.2d 32 (5th Cir. 1972) (2-1 decision), *cert. denied*, 93 S. Ct. 901 (1973), a weak prop since the principal issue there decided was that prior to 1972 amendment, Title VII did not cover the in-house hiring of a state employment agency. *Struck* v. *Secretary of Defense*, 460 F.2d 1372 (9th Cir. 1971), has been remanded to determine whether the judgment should be vacated for mootness, 41 U.S.L.W. 3346 (U.S. Dec. 19, 1972). *Gutierrez* v. *Laird*, 346 F. Supp. 289 (D.D.C. 1972), was vacated as moot after the Air Force waived its pregnancy discharge regulation. D.C. Cir. Feb. 6, 1973, as amended May 8, 1973.

or national origin. Acting under the authority of the commerce clause of the Constitution, Congress extended to the area of private employment guarantees of nondiscriminatory treatment secured in the public sphere by constitutional guarantees of due process and equal protection.[8] In 1972, Title VII was amended to further promote equal employment opportunities by extending coverage to state and municipal employees and specifying procedures to effectuate the policy of nondiscrimination in federal government employment. Public Law 92-621, 86 Stat. 103, March 24, 1972. The Equal Employment Opportunity Commission, the federal agency charged with administration of Title VII, has issued Sex Discrimination Guidelines implementing the congressional mandate that individuals be considered on the basis of individual capacities and not on the basis of characteristics typically attributed to their sex or to a defined portion of their sex. These Sex Discrimination Guidelines state explicitly that disadvantaged treatment of pregnant women is sex discrimination.[9] They stipulate that a policy "which excludes from employment . . . employees

[8] *See Walker* v. *Kleindienst*, 357 F. Supp. 749 (D.D.C. 1973) (extension of Title VII to public employees provided a new remedy, but the right to nondiscriminatory treatment inheres in the Constitution).

[9] 29 CFR 1604.10. This guideline reflects the studies and recommendations of the Citizens' Advisory Council on the Status of Women. *See* Koontz, Childbirth and Child Rearing Leave: Job-Related Benefits, 17 N.Y.L.F. 480 (1971); Comment, Love's Labors Lost: New Conceptions of Maternity Leaves, 7 Harv. Civ. Rights—Civ. Lib. L. Rev. 260 (1972). *See also* Office of Federal Contract Compliance Sex Discrimination Guidelines, 41 CFR 60-20 (applicable to employers performing federal contracts): "Women shall not be penalized in their conditions of employment because they require time away from work because of childbearing." 41 CFR 60-20.3(g); Department of Health, Education and Welfare Higher Education Guidelines 12-13 (October 1972) (prohibiting discrimination against pregnant women).

because of pregnancy is in prima facie violation of Title VII," [10] and that "disabilities caused . . . by pregnancy . . . are, for all job-related purposes, temporary disabilities" that may not be singled out for restrictive treatment.

State agencies administering state fair employment practice laws have adopted similarly explicit guidelines. For example, the Washington State Human Rights Commission has declared: "It is an unfair practice to discharge a woman or penalize her in terms and conditions of employment because she requires time away from work for childbearing." [11] Similarly, the New York State Division of Human Rights has ruled that requiring teachers to take a leave of absence after the fourth month of pregnancy and to remain on leave until at least six months after the birth of the child constitutes sex discrimination. The Division order requires that pregnant teachers be allowed to work before and after pregnancy as long as the attending physician

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[10] For an illustrative case, *see Doe* v. *Osteopathic Hospital*, 333 F. Supp. 1357 (D. Kan. 1971).

[11] Washington State Human Rights Commission, New Employment Regulations: Maternity Leave Policy, WAC 162-30-020(2), adopted June 22, 1972, effective July 26, 1972. *Compare* Minnesota Department of Human Rights Guidelines which read in part as follows:

> c. an employer shall not maintain a policy for the termination of the employment of pregnant females which is based solely on pregnancy, or on a specific number of months of pregnancy. Such policy shall be based upon individual capacities, or characteristics, ability to perform specific duties of employment, efficiency, personal medical safety, or willingness to continue work . . . (effective June 22, 1971).

For other examples, *see* Illinois Sex Discrimination Guidelines effective Nov. 3, 1971, CCH Emp. Practices Guide ¶22,497.10; Maryland Sex Discrimination Guidelines, July 11, 1972, CCH Emp. Practices Guide ¶23,820.08; Pennsylvania Sex Discrimination Guidelines, as amended, Dec. 25, 1971, CCH Emp. Practices Guide, ¶27,296.02; Industrial Commission of Wisconsin (rules and practice implementing State Fair Employment Act §111.31-37).

approves. *State Division of Human Rights* v. *Board of Education of Union Free School District #22,* Case Nos. CS-21025-70 *et seq.* (June 29, 1971).[12]

In light of the sex discrimination definitions now guiding employers in the private as well as the public sector, Judge Haynsworth's conclusion in *Cohen* that the contested regulation does not apply to women in an area in which they compete with men, and was therefore non-discriminatory, is untenable. Rather, as the dissenting judges in *Cohen* recognized, the "inescapable truth" is that "female employees are the only employees . . . who become pregnant; it follows that they are provisionally dismissed from work on account of their sex."[13]

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[12] *See also Staten* v. *East Hartford Board of Education,* Case No. F.E.P.-6-34-1, CCH Emp. Practices Guide ¶5055 (Mar. 28, 1972); *Cooley* v. *Board of Education, Waterford Union High School,* 1 Equal Rights Decisions of the Department 26, CCH Emp. Practices Guide ¶5079 (Dec. 6, 1971).

Recent activity has also centered on removal of barriers to receipt of unemployment compensation by pregnant and post-partum women. *See, e.g.,* Michigan Attorney General's Opinion, February 18, 1972: The rules governing eligibility for unemployment insurance benefits that deprive a pregnant woman of eligibility to receive benefits during the period that begins with the tenth calendar week before expected confinement and extends through the sixth calendar week following termination of pregnancy are invalid because they discriminate against females on the basis of a physical condition unique to that sex and are in violation of the equal protection clause of the Federal Constitution.

For unemployment compensation modifications in other states *see* Connecticutt §31-236(5), repealed by P.A. 140, L. 1973, effective October 1, 1973; Delaware §3315(9), as amended by Ch. 518, L. 1972; Illinois, §500, c. 4, as amended by P.A. 77-1809, L. 1972; Maine §1192.3 as amended by ch. 538 L. 1971; Oregon, §657.160(2), as amended by ch. 75, L. 1969.

[13] 474 F.2d at 401. As more spectacularly expressed in Judge Duniway's dissenting opinion in *Struck* v. *Secretary of Defense,* 460 F.2d at 1379, if involuntary discharge of a woman solely on the ground of her pregnancy is not sex discrimination, nothing is!

II.

Regulations that force a woman out of employment at a fixed stage of pregnancy operate as "built-in headwinds" that drastically curtail women's opportunities.

Heading the list of arbitrary barriers that have plagued women seeking equal opportunity is disadvantaged treatment based on their unique child-bearing function. *See* Love's Labors Lost: New Conceptions of Maternity Leaves, 7 Harv. Civ. Rights—Civ. Lib. L. Rev. 260 (1972); Note, Pregnancy Discharges in the Military: The Air Force Experience, 86 Harv. L. Rev. 568 (1973). This reality has been obscured by the historical tendency of legislators to label sex discriminatory legislation "protective," and of jurists to regard any discrimination in the treatment of women as "benignly in their favor."[14] Summary dismissal or forced, unpaid leave for pregnant women, still widespread and until very recently the common pattern,[15] continues to be rationalized as "protective," although the object of the protection is less than apparent.[16] In fact, such prac-

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[14] *Cf.* 1 Blackstone's Commentaries on the Laws of England 445 (3d ed. 1768) ("[E]ven the disabilities which the wife lies under are for the most part intended for her protection and benefit: so great a favourite is the female sex of the laws of England.").

[15] *See* Address by Jacqueline G. Gutwillig, Chairman of the Citizens' Advisory Council on the Status of Women, at the Conference of the Interstate Association of Commissions on the Status of Women, in St. Louis, June 19, 1971; Koontz, Childbirth and Child Rearing Leave: Job-Related Benefits, 17 N.Y.L.F. 480 (1971).

[16] *Compare La Fleur* v. *Cleveland Board of Education*, 326 F. Supp. 1208 (N.D. Ohio, 1971), *reversed*, 465 F.2d 1184 (6th Cir. 1972) (district court reasoned that the right to education is "fundamental," hence children must be spared exposure to visibly pregnant teachers), *with* Brief for Petitioner, *Cleveland Board of Education*

tices operate as "built-in headwinds"[17] that drastically curtail women's opportunities.

Unquestionably, many women are capable of working effectively during pregnancy and require only a brief period of absence immediately before and after childbirth. *See* Love's Labors Lost: New Conceptions of Maternity Leaves, *supra*, 7 Harv. Civ. Rights—Civ. Lib. L. Rev. at 262 n. 11; Curran, Equal Protection of the Law; Pregnant School Teachers, 285 N. England J. Med. 336 (1971).[18]

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v. *La Fleur* at 15 (education is not fundamental hence teachers have no right to protection from employment termination for pregnancy).

[17] *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 432 (1971) (impact of testing on blacks).

The effect of mandatory termination for pregnancy regulations was carefully assessed in *Heath* v. *Westerville Board of Education, supra.* Citing A. Montagu, The Natural Superiority of Women 16-17 (rev. ed. 1970), the court noted that "other societies have totally different responses to the fact of pregnancy and consider it a far less debilitating condition than does American society." The court then observed that "the very solicitous treatment of pregnancy, including the requirement that the new mother not return to her job for one year followng delivery is more a manifestation of cultural sex role conditioning than a response to medical fact and necessity. The fact that [the plaintiff] does not fit neatly into the stereotyped vision . . . of the 'correct' female response to pregnancy should not redound to her economic or professional detriment." 345 F. Supp. at 505 n. 1.

[18] *See* Testimony of Andre E. Hellegers, Professor of Obstetrics-Gynecology, Professor of Physiology-Biophysics and Director of Population Research at Georgetown University, before the Federal Communications Commission, December 1, 1971. In the Matter of Petitions filed by the Equal Employment Opportunity Commission, *et al.*, Docket No. 19143: "It is of some significance that women doctors and nurses, who are working on the obstetrical and other services at the hospital, often continue working right up to the day of delivery. This of course would not be so if the medical profession thought that working in pregnancy was contra-indicated."

Regulations that disregard this reality and "protect" all women who are pregnant, that is, deny them the opportunity to work without regard to individual circumstances, have in practice deprived working women of the protection they most need: protection of their right to work to support themselves and, in many cases, their families as well. Moreover, a mandatory "leave" or termination policy insures that a woman will not be "an equal competitor with her brother," [19] for it deprives her of opportunity for training and work experience during pregnancy and, in many cases, for a prolonged period thereafter.

For a large segment of the female labor force, gainful employment is dictated by economic necessity.[20] Earnings for this group are hardly "pin money"; their jobs are often the sole source of income for themselves and, in many cases, their dependent children. Even where husbands are present and employed, the wife's earnings frequently are necessary to keep the family above a bare subsistence level. Involuntary termination of employment for pregnancy, attended by loss of income and fringe bene-

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[19] *Muller* v. *Oregon*, 208 U.S. 412, 422 (1908).

[20] Approximately 33 million women are in the labor force today. The majority of them do not have the option of working solely for personal fulfillment. Most of the 7.2 million single women workers worked to support themselves or others. Nearly all of the 6 million women workers who were widowed, divorced, or separated from their husbands—particularly the women who were also raising children—were working for compelling economic reasons. The 4.2 million married women workers whose husbands had incomes of less than $5,000 in 1970 almost certainly worked because of economic need. The same is probably true of the 3.2 million women whose husbands had incomes between $5,000 and $7,000. Figures taken from Why Women Work, Women's Bureau, Employment Standards Administration, U.S. Department of Labor (July 1972).

fits,[21] and frequently denial of the right to return to work immediately after childbirth disables these women far more than their temporary physical condition.[22]

For the more fortunate woman, for whom work is not dictated by economic necessity, mandatory pregnancy "leave" reinforces societal pressure to relinquish career aspirations for a hearth-centered existence. Loss of her job and often accumulated benefits profoundly affect the choices open to her.[23] If her right to return is not guaran-

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[21] For example, a teacher forced out of school due to pregnancy may lose health insurance benefits at a time when she cannot obtain new insurance, even assuming her resources would permit her to pay the premium. Despite her doctor's certification that she is able to work, unemployment compensation may be denied to her, and if she does become disabled, disability insurance may not be available to ease her plight.

[22] *See* Testimony of Andre E. Hellegers, *supra*: "In the only large-scale analysis of work in pregnancy, involving close to four million women, women without incomes had a poorer outcome of pregnancy than women with incomes." [The study to which Dr. Hellegers referred is A. W. Diddle, Gravid Women at Work, Fetal and Maternal Morbidity, Employment Policy, and Medicolegal Aspects, 2 Journal of Occupational Medicine 10-15 (1970).]
See also Carey, Pregnancy Without Penalty, publication forthcoming in 1 Civil Liberties Review (Fall, 1973).

[23] Typical examples appear in the records of cases in which women litigated up to this Court what seemed to them a matter of plain injustice. Captain Susan R. Struck was subjected to over two years of repeated 24-hour discharge notices until, on the eve of this Court's review, the Air Force abandoned the contest. *Struck* v. *Secretary of Defense*, 460 F.2d 1372 (9th Cir. 1971), *cert. granted*, 409 U.S. 947 (1972), *remanded for consideration of mootness*, 41 U.S.L.W. 3346 (U.S. Dec. 19, 1972). Mary Ellen Schattman, forced to leave her job as a market analyst at seven months, sought but was unable to find other employment prior to the birth. She was offered a job by the same employer after the birth, but in another city. Because she was then the family's principal breadwinner, her husband moved with her, disrupting his legal studies at Austin. *Schattman* v. *Texas Employment Commission*, 459 F.2d 32 (5th Cir. 1972), *cert. denied*, 93 S. Ct. 901 (1973).

teed, she is apt to encounter discrimination in locating new employment, this time because she is a mother.[24] If she defers return to the labor force for an extended period, her skills will have grown rusty and, upon attempted reentry, she will face a further barrier: this time her age as well as her sex and limited work experience will count against her.[25]

III.

School board regulations mandating involuntary termination of a teacher's employment at a fixed stage of pregnancy are inconsistent with the equal protection clause of the fourteenth amendment.

In determining whether governmental action at the federal, state or local level violates the equal protection principle, courts have applied standards of review ranging from lenient to stringent. *See* Developments in the Law —Equal Protection, 82 Harv. L. Rev. 1065 (1969). Two standards are generally contrasted: (1) the lenient or "reasonable relationship" test; (2) the "strict scrutiny" test met only by demonstration of a "compelling state interest," applicable when the action invokes a "suspect" criterion or impinges upon a "fundamental right." In recent commentary and judicial opinion jurists have noted

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[24] *See Phillips* v. *Martin Marietta Corp.*, 400 U.S. 542 (1971). In these days of teacher surplus her new employment opportunity is further diminished. Significantly, in *Buckley* v. *Coyle Public School System*, 476 F.2d 92 (10th Cir. 1973), it was alleged that the termination for pregnancy rule operated with particular severity on black teachers.

[25] "When her youngest child enters school today's mother has 40 years of life yet ahead." California Women, Report of the Advisory Committee on the Status of Women 5 (1971).

the emergence of "an 'intermediate approach' between rational basis and compelling interest as a test of validity under the equal protection clause," *Eslinger* v. *Thomas*, 476 F.2d 225, 231 (4th Cir. 1973). This approach focuses on the substance of the governmental interest sought to be served and calls for assessment of the reasonableness of the means by which the regulation in question attempts to advance the identified interest. *See* Gunther, The Supreme Court, 1971 Term, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1 (1972); *Boraas* v. *Village of Belle Terre*, 476 F.2d 806 (2d Cir. 1973).

With respect to the applicable standard of review in the instant cases, the position of *amici* is three-fold: (1) the regulations mandating termination of a school teacher's employment at a fixed stage of pregnancy, without regard to her preference and her physician's certification of her ability to continue teaching, establish a suspect classification for which no compelling justification exists; (2) the regulations impinge upon the exercise of a fundamental right and must therefore be subjected to close scrutiny; (3) the classification made in the regulations jeopardizes women's access to equal employment opportunity without promoting any substantial state interest.

A. *The challenged regulations establish a suspect classification.*

With some notable exceptions, until the current decade, the review standard for equal protection challenges to legislation according different treatment to women and men was deferential in the extreme. No line drawn between the sexes, however sharp, failed to survive constitutional assault. Gross generalizations concerning woman's

place in man's world were routinely accepted as sufficient to justify discriminatory treatment. *See, e.g., Hoyt* v. *Florida*, 368 U.S. 57 (1961); *Goesaert* v. *Cleary*, 335 U.S. 464 (1948); Johnston & Knapp, Sex Discrimination by Law: A Study in Judicial Perspective, 46 N.Y.U. L. Rev. 675 (1971).[26]

In 1971, revaluation of the impact of sex lines in the law was signalled by this Court's decision in *Reed* v. *Reed*, 404 U.S. 71. *Reed* invalidated an Idaho statute that gave a preference to men over women for appointment as estate administrators. Explicitly repudiating one-eyed sex role thinking as a predicate for governmental distinctions, the *Reed* opinion declared

> [the statute] provides that different treatment be accorded to the applicants on the basis of their sex: it thus establishes a classification subject to scrutiny under the Equal Protection Clause. 404 U.S. at 75.

Recognizing that the governmental interest urged to support the Idaho statute was "not without some legitimacy,"

[26] Cleveland School Board's reliance on *Goesaert* and *Hoyt*, *see* Brief for Petitioners at 31-32, and recent judicial citation of the holdings of those cases as authoritative, *e.g.*, *State* v. *Sinclair*, 258 La. 84, 245 So.2d 365 (1971); *State* v. *Enloe*, No. 52,424 (Louisiana Supreme Court March 26, 1973) (service on juries by women may be restricted to volunteers), evidence the need for explicit overruling by this Court. *Goesaert* has become an embarrassment to enlightened courts and has been politely but firmly discarded by them. *E.g.*, *Sail'er Inn Inc.* v. *Kirby*, 5 Cal. 3d 1, 485 P.2d 529 (1971); *Paterson Tavern & Grill Owners Ass'n* v. *Borough of Hawthorne*, 57 N.J. 180, 270 A.2d 628 (1970). *Hoyt* has inspired extravagant description of the frivolity of women, *De Kosenko* v. *Brandt*, 63 Misc.2d 895, 898, 313 N.Y.S.2d 827, 830 (Sup. Ct. 1970). Moreover, it is responsible for perpetuation of a system that in practice results in the virtual exclusion of women from lay participation in the administration of justice. *See State* v. *Daniels*, 262 La. 475, 491, 263 So.2d 859, 864 (1972) (dissenting opinion).

404 U.S. at 76, the Court nonetheless found the legislation constitutionally infirm because it provided "dissimilar treatment for men and women who are . . . similarly situated." 404 U.S. at 77.

Reed was assessed by courts and commentators as a harbinger of fundamental change in the Court's perspective with regard to sex-based classifications.[27] It was apparent that the Court had departed significantly from the "traditional" approach to regulation that set women apart for special treatment.[28] Sex-based distinctions were to be subject to "scrutiny," a word until *Reed* typically reserved for race discrimination cases. Surely *Reed* did not apply the "traditional" standard that mandated tolerance of a legislative classification "if any state of facts reasonably may be conceived to justify it." *McGowan* v. *Maryland*,

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[27] *See Brenden* v. *Independent School District*, 41 U.S.L.W. 2590 (8th Cir. April 18, 1973); *Eslinger* v. *Thomas*, 476 F.2d 225 (4th Cir. 1973); *Green* v. *Waterford Board of Education*, 473 F.2d 629 (2d Cir. 1973); *Moritz* v. *Commissioner*, 469 F.2d 466 (10th Cir. 1972), *cert. denied*, 41 U.S.L.W. 3616 (U.S. May 22, 1973); *Lamb* v. *Brown*, 456 F.2d 18 (10th Cir. 1972); *La Fleur* v. *Cleveland Board of Education*, 465 F.2d 1185 (6th Cir. 1972); *Williams* v. *San Francisco Unified School District*, 340 F. Supp. 438 (N.D. Calif. 1972); *Heath* v. *Westerville Board of Education*, 345 F. Supp. 501 (S.D. Ohio 1972); *Robinson* v. *Rand*, 340 F. Supp. 37 (D. Colo. 1972); *Bray* v. *Lee*, 337 F. Supp. 934 (D. Mass. 1972); *Shull* v. *Columbus Municipal Separate School District*, 338 F. Supp. 1376 (N.D. Miss. 1972); *Reed* v. *Nebraska School Activities Ass'n*, 341 F. Supp. 258 (D. Neb. 1972); *Matter of Patricia A.*, 31 N.Y.3d 83, 335 N.Y.S.2d 33 (1972).

See Gunther, In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1, 34 (1972); Note, 86 Harv. L. Rev. 568, 583-88 (1973).

[28] Responsive to the even-handed treatment mandated by this Court in *Reed*, on March 28, 1973, the probate court in Boise, Idaho appointed Sally Reed and Cecil Reed co-administrators of the estate of Richard Lynn Reed.

366 U.S. 420, 426 (1961). For the Idaho Supreme Court, and this Court as well, conceived such facts.

The direction first charted in *Reed* was confirmed by this Court's judgment in *Frontiero* v. *Richardson*, 93 S. Ct. 1764 (1973), which declared inconsistent with equal protection a fringe benefit scheme that awarded male members of the military housing allowance and medical care for their wives, regardless of dependency, but authorized benefits for female members of the military only if they in fact supported their husbands. While *Reed* involved an obsolete statute repealed, although not with retroactive effect, even before this Court heard the case, the differential involved in *Frontiero* reflected a pervasive legislative pattern. For dozens of examples on the federal level, *see* Petition for Certiorari, Appendix E, *Commissioner of Internal Revenue* v. *Moritz*, No. 72-1298 (March 22, 1973).[29] Despite the obvious significance of rejection of a common statutory classification, this Court was unwilling to perpetuate approval of lump treatment of men and women.

The plurality opinion in *Frontiero* declares that "classifications based upon sex, like classifications based on race, alienage or national origin, are inherently suspect and must therefore be subjected to close judicial scrutiny." 93 S. Ct. at 1771. Justice Stewart, concurring in the judgment, regarded the distinction drawn by the statutes involved in *Frontiero* as "invidious," and eight members of this Court

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[29] Automatic qualification of wives as dependent, whether or not they are in fact, but requirement of proof of actual dependency of husbands is the scheme of the Social Security Act and of many state and federal employment benefit programs. *See, e.g.*, Bixby, Women and Social Security in the United States, DHEW Pub. No. (SSA) 73-11700 (1972).

rejected "administrative convenience" as justification for the sex line there at issue.

The regulations challenged here, exposed to the quality of judicial review required by *Frontiero*, must be rejected, for the notion that pregnancy enfeebles a capable healthy woman has been thoroughly discredited,[30] and forced confinement of women during pregnancy, once regarded as "protective," has been exposed as a prime example of class restriction that blunts individual opportunity.[31]

B. *The challenged regulations unreasonably condition the exercise of a right of fundamental constitutional dimension.*

To the public employee confronting an iron rule terminating her employment at a fixed stage of pregnancy, the law must appear as it did to Oliver Twist's Mr. Bumble. This Court's landmark decisions in *Roe* v. *Wade*, 93 S. Ct. 705 (1973), and *Doe* v. *Bolton*, 93 S. Ct. 739 (1973), recognize her constitutional right to terminate her pregnancy. If she chooses that course, she need not fear arbitrary dismissal. If she elects to bear her child, then without regard to the

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[30] *See* A. Montagu, The Natural Superiority of Women 16-17 (rev. ed. 1970).

[31] *See* pp. 18-22 *supra*. For comprehensive review of "benign" classifications ultimately harmful to women, *see* Brief for Petitioner, *Struck* v. *Secretary of Defense*, No. 72-178, at 38-47; Brief for American Civil Liberties Union, *Amicus Curiae*, *Frontiero* v. *Richardson*, No. 71-1694, at 34-44. In *Reed* and *Frontiero*, this Court demonstrated its understanding of the message sought to be conveyed by Judge Burnita Shelton Matthews, before her appointment to the federal bench, when she served as counsel to the National Women's Party. Decades ago, she called attention to the "defective vision" of men of the legal profession who regarded discrimination as "protection." Matthews, Women Should Have Equal Rights With Men, 12 A.B.A.J. 117, 120 (1926).

state of her health, she will be forced out of employment.[32] But surely the Constitution does not abide choice of this quality. On the contrary, the decision in *Roe* v. *Wade* defines a right to determine, without undue state interference, "whether *or not*" to continue a pregnancy.[33] Since this right has been ranked by the Court as fundamental, a further basis for close scrutiny is present.

The plain implication of last term's landmark decisions cannot be undermined by the discredited argument that no one has a right to public employment. This point was made with appropriate dispatch by the Tenth Circuit in *Buckley* v. *Coyle Public School System*, 476 F.2d 92, 96-97 (1973).[34] Regulations that automatically terminate a teacher's employment at a fixed stage of pregnancy

> invade [the teacher's] privacy by requiring her to choose between employment and pregnancy . . . .
>
> . . . .
>
> While it is true that [a teacher] does not have a constitutional right to continue public employment, it cannot be gainsaid that she does have a right to be free

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[32] The perspective of women faced with this choice is exemplified in Petition for Rehearing, *Schattman* v. *Texas Employment Commission*, No. 72-474, filed *pro se* by Ms. Schattman in February, 1973.

> This Court's failure to face the issue of the rights of pregnant women has created a very real threat of economic blackmail. . . . Where abortion is legal, it is not unreasonable to expect both public and private employers to resort to this kind of pressure. It will be especially effective where the woman's threatened income is essential to her family's financial security. Petition, *supra*, at 4.

[33] 93 S. Ct. at 727.

[34] *Accord*, *La Fleur* v. *Cleveland Board of Education*, 465 F.2d at 1188; *Williams* v. *San Francisco Unified School District*, 340 F. Supp. at 443.

from the imposition of unconstitutional conditions in connection with that employment.

See generally Keyishian v. *Board of Regents*, 385 U.S. 589, 605-606 (1967); *Pickering* v. *Board of Education*, 391 U.S. 568 (1968); Van Alstyne, The Demise of the Right-Privilege Distinction in Constitutional Law, 81 Harv. L. Rev. 1439 (1968).

The limits of reasonable regulation in this context are indicated in *Roe* v. *Wade* and *Doe* v. *Bolton, supra*. *Roe* recognized the validity of regulation tailored to preservation of a pregnant woman's health. That the regulations here at issue are not so tailored is apparent even from the testimony of Dr. William C. Weir, the medical expert upon whom the Cleveland Board of Education places greatest reliance. Dr. Weir testified that the middle trimester "is considered by far the safest time" for a woman who has chosen not to terminate her pregnancy. Appendix, *Cleveland Board of Education* v. *La Fleur* at 123a. *See also Heath* v. *Westerville Board of Education*, 345 F. Supp. 501, 505 (S.D. Ohio 1972) ("It appears that the first trimester of pregnancy (months 1-3), and not the second (months 4-6) are the most dangerous, in medical terms, to the expectant mother."). Yet that "safest time" is selected in Cleveland and Chesterfield County as the point at which the pregnant teacher must leave.

Doe v. *Bolton* is instructive on the kind of regulation that would reasonably relate to maternal health. This Court appraised as unreasonable Georgia's requirement that to terminate a pregnancy multiple medical opinions were required. By subjecting the opinion of the woman's physician to further review, Georgia exceeded the limits of reasonable regulation. Each of the teachers in the cases at bar

was certified by her physician to be in good health, and physically capable of working throughout pregnancy. Certification based on individual fitness is all that a regulation reasonably related to health may require. As Justice Douglas explained, "the right to seek advice on one's health and the right to place . . . reliance on the physician of [the individual's] choice are basic to fourteenth amendment values." *Roe* v. *Wade, supra,* 93 S. Ct. at 761. Totally inconsistent with fourteenth amendment values is the lump treatment accorded all pregnant women by the regulations here at issue.

Appallingly overbroad as health regulations, rules mandating termination of a school teacher's employment at a fixed stage of pregnancy in fact reflect the discredited notion that the visibly expectant mother should not be seen at work, but should be confined at home to await childbirth, and thereafter devote herself to childcare. Imposition of this outmoded standard upon women who prefer gainful employment to confinement encroaches upon their right to privacy in the conduct of their personal lives.[35] As recently affirmed in *Roe* v. *Wade,* "this right of privacy . . . is broad

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[35] *See, e.g., Stanley* v. *Georgia,* 394 U.S. 557, 564 (1969) ("also fundamental is the right to be free, except in very limited circumstances, from unwarranted governmental intrusions into one's privacy"); *Skinner* v. *Oklahoma,* 316 U.S. 535, 536 (1942) ("right to have offspring" recognized as a basic human right); *Union Pacific Ry.* v. *Botsford,* 141 U.S. 250, 251 (1891) ("No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person").

As to privacy in family life and with respect to marriage and parenthood, *see Meyer* v. *Nebraska,* 262 U.S. 390, 399-400 (1923); *Pierce* v. *Society of Sisters,* 268 U.S. 510, 534-35 (1925); *Prince* v. *Massachusetts,* 321 U.S. 158, 166 (1944); *Loving* v. *Virginia,* 388 U.S. 1, 12 (1967). *See also, Griswold* v. *Connecticut,* 381 U.S. 479 (1965), which underscored this Court's position on the funda-

enough to encompass a woman's decision whether or not to terminate her pregnancy."[36] But autonomy in deciding whether to bear a child is curtailed if job security is contingent on remaining childless.

Significantly, a male teacher encounters no governmental intrusion into the matter of his decision whether to beget a child. But the female teacher risks termination of her professional career unless she decides not to bear a child. The double standard[37] responsible for regulations that force pregnant women to relinquish gainful employment was discerned in *Robinson* v. *Rand*, 340 F. Supp. 37 (D. Colo. 1972), a decision declaring unconstitutional an Air Force regulation mandating the discharge of pregnant servicewomen. The court observed that "the accused Air Force regulation does operate discriminately, may well be based on outmoded stereotypes, and does force a woman to choose between important private rights and her career." 340 F. Supp. at 38. Balancing the vital personal interests at stake against the asserted interests of the military, the court concluded that any legitimate purpose of the Air Force could have been served by far less drastic means. In view of the special attributes of military service and the reluctance of courts to override military regulations,[38] the analysis in

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mental right to personal privacy, and *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972), which made explicit the breadth of the underlying principle of *Griswold*: "If the right of privacy means anything, it is the right of the individual . . . to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." 405 U.S. at 453.

[36] 93 S. Ct. at 727.

[37] *Cf. Matter of Patricia A.*, 31 N.Y.2d 83, 335 N.Y.S.2d 33 (1972).

[38] *See Orloff* v. *Willoughby*, 345 U.S. 83 (1953).

Robinson has particular force. Even more telling is the swift adjustment made by the military to a system that permits pregnant women to continue pursuit of their service careers.[39]

In sum, the regulations challenged by the school teachers in this litigation unreasonably condition their exercise of a right of fundamental constitutional dimension. Justified neither by logic nor by experience, the regulations arbitrarily inhibit a female teacher's aspirations for and access to an adult life in which work and family can be pursued in combination.

C. *The classification made in the challenged regulations does not advance a substantial governmental interest in a reasonable manner.*

Identifying as the "crucial question" whether involuntary termination of a school teacher's employment at a fixed stage of pregnancy "suitably" furthers "an appropriate governmental interest," the Second Circuit, in *Green* v. *Waterford Board of Education, supra,* concluded that the termination rule's "rigid classification" did not "sufficiently promote" any such interest. Similarly applying a standard of review less than "strict" but requiring a validating relationship more than "minimal," a three-judge court in *Aiello* v. *Hansen,* —— F. Supp. —— (N.D. Calif. May 31, 1973), declared exclusion of pregnancy from the state disability insurance program inconsistent with equal protection.[40]

The familiar justifications for the inflexible termination rule were perceptively reviewed by the court in *Green,* as

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[39] *See* Memorandum for the Respondents Suggesting Mootness, *Struck* v. *Secretary of Defense,* No. 72-178, filed December 1972.

[40] On the cost of full coverage for pregnancy in employment-related insurance programs, *see* Greenwald, Maternity Leave Policy, New England Economic Review 13 (Jan./Feb. 1973); Gutwillig,

they were by the court in *La Fleur* and the dissenting judges in *Cohen*. As to the purported concern for the health of the woman and unborn child, *Green* observes:

> Why the Board should choose, by means of an inflexible rule, to manifest particular concern with the health of a pregnant woman, but not, for example, with the health of a teacher (male or female) recuperating from a heart attack is nowhere explained. In any event, we see little rationality in a rule that purports for reasons of health alone to treat all pregnancies alike rather than on a case-by-case basis. 473 F.2d at 634-635.

And in *Heath* v. *Westerville Board of Education*, 345 F. Supp. 501, 505 (S.D. Ohio 1972), the court indicated why women find this alleged concern particularly offensive:

> [N]o two [pregnancies] are entirely identical. . . . While . . . some women are incapacitated by pregnancy . . . to say that this is true of all women is to define one half of our population in stereotypical terms and to deal with them artificially . . . Any rule by an employer that seeks to deal with all pregnant employees in an identical fashion is dehumanizing to the individual women involved and is by its very nature arbitrary and discriminatory.

The court in *Green* similarly discounted the challenged regulation's impact on continuity of instruction in the schools. While acknowledging that continuity of instruction is an important state interest, the court concluded

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Job-Related Maternity Benefits, address delivered by the Chairman of the Citizens' Advisory Council on the Status of Women to the American Hospital Association Institute (July 27, 1972).

that the relationship between an arbitrary maternity "leave" rule and that interest was "insufficiently 'fair and substantial' to pass constitutional muster." Orderly transition is preserved when a teacher provides the school board with a certain date for commencement of her medical leave. 473 F.2d at 636. Indeed *Green, Cohen,* and *La Fleur* demonstrate that forced termination at a fixed stage of pregnancy in fact disserves the state interest in continuity of instruction. All of the teachers involved in these cases wished to teach until the end of the school term. Their physicians provided assurance of their fitness to do so. No individual assessment was made by the respective school boards of the teacher's ability to continue working. Instead, each was summarily dismissed when the term was in full swing. Only in Alice's world could it be urged that "continuity of education" was fostered by calling in substitutes to finish out the term.

As to "administrative convenience," mindful of the admonition in *Reed,* 404 U.S. at 76, and *Stanley* v. *Illinois,* 405 U.S. 645 (1972), subsequently underscored in *Frontiero, supra,* the *Green* court reasoned:

> While it might be easier for the Board to handle all maternity leave problems on an arbitrary, blanket basis, a reduced administrative workload is constitutionally insufficient to sustain . . . discriminatory treatment of pregnant women. 473 F.2d at 636.

Accord, Cerra v. *East Stroudsburg Area School District, supra,* 450 Pa. at 213, 299 A.2d at 280; *Pocklington* v. *Duval County School Board,* 345 F. Supp. 163, 165 (M.D. Fla. 1972). Moreover, if anything in the law is perfectly clear, it is this Court's refusal to tolerate "convenience" as an excuse for conclusive presumption of unfitness or disquali-

fication. *See United States Department of Agriculture* v. *Murry*, 41 U.S.L.W. 5099 (U.S. June 25, 1973); *Vlandis* v. *Kline*, 41 U.S.L.W. 4796 (U.S. June 11, 1973).

While a visible pregnancy may have distracted jurists schooled in an earlier age,[41] this most natural phenomenon hardly startles today's student population. Again *Green* gave the point the attention it merited:

> We regard [the asserted interest in avoiding classroom distraction] as almost too trivial to mention. . . . Whatever may have been the reaction in Queen Victoria's time, pregnancy is no longer a dirty word. 473 F.2d at 635.

Finally, safety. The school board would spare the pregnant woman from accident and assault. Certainly these are risks. But it is ludicrous to suggest that a robust pregnant teacher of twenty-five is in need of insulation from these risks more than a fifty-five year old man or woman with ulcers, high blood pressure or a heart condition. *See Green* v. *Waterford Board of Education, supra*, 473 F.2d at 635.[42]

In sum, the regulations challenged here rely on a sex-based stereotype no less invidious than one racial or religious; they establish a conclusive presumption which is factually unjustified and bears no reasonable and just relation to any permissible governmental objective. Because mandatory maternity "leave" provisions exclude from consideration the fitness of the individual, and treat pregnancy differently from any other physical condition occasioning a period of temporary disability, they deprive pregnant teachers of the equal protection of the laws.

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[41] *See La Fleur* v. *Cleveland Board of Education*, 326 F. Supp. 1208, 1210, 1213 (N.D. Ohio 1971), *reversed*, 465 F.2d 1184 (1972).

[42] *See also Bravo* v. *Board of Education of Chicago*, 345 F. Supp. 155, 158 (N.D. Ill. 1972) (raising and rejecting the safety concern).

CONCLUSION

For the reasons stated above, the decision of the Court of Appeals for the Fourth Circuit should be reversed, the decision of the Court of Appeals for the Sixth Circuit should be affirmed and school board regulations that require termination of the employment of teachers at a fixed stage in the pregnancy cycle should be declared unconstitutional.

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